SUNDARESAN RAMANATHAN CHETTIAR & ANOR A

v.

GOPAL KRISHNAN DN SAMY

HIGH COURT MALAYA, PULAU PINANG B
VARGHESE GEORGE J
[CIVIL SUIT NO: 22NCVC-619-09-2011]
26 APRIL 2013

CONTRACT: *Formation - Concluded contract - Whether parties agreed on essential terms, mutual risks and obligations to form valid binding contract - Whether agreement to execute formal contract merely expressed desire on manner transaction agreed upon would be performed - Approach taken in assessing damages payable in lieu of order for specific performance - Specific Relief Act 1950, s. 18* C D

The plaintiffs brought the instant action against the defendant for specific performance of a contract for sale of land ('the land') contained in a memorandum of understanding ('MOU') signed between the parties. The MOU was executed when the defendant was not yet registered as owner of the land but was in the midst of a court proceedings to compel the relevant authorities to give effect to a previous order of the court declaring him as the owner of the land. The MOU provided that once he became the registered owner of the land, the defendant (i) would sell the land to the plaintiffs for RM700,000; (ii) the parties would execute a formal sale and purchase agreement ('SPA') for that purpose; (iii) RM70,000 paid by the plaintiffs as consideration under the MOU would be treated as the deposit under the SPA; and (iv) if the plaintiffs failed to sign the formal SPA within a stipulated time-frame, the defendant could forfeit the deposit. The defendant was obliged under the MOU to keep the plaintiffs informed of the progress of the court proceedings seeking his registration as owner of the land. However, once the land was transferred into his name, the defendant sold the land to a third party for RM1.2 million and after receiving the sum, he sent a letter through his solicitors to the plaintiffs enclosing a cheque for RM70,000 in favour of the first plaintiff and stated that the MOU was thenceforth cancelled. The plaintiffs did not bank in the cheque but instead sent letters to the defendant demanding that he fulfill his obligations under the MOU. When the demands went unheeded, they filed the instant action in which they alternatively prayed for damages if specific performance was not possible. The E F G H I

defendant contended that the contract for the sale of the land in the MOU was a sham and that the MOU was a 'collateral' for repayment of a RM70,000 loan he took from a money lending company run by the first plaintiff. The plaintiffs said the money lending transaction was distinct and separate from the contract in the MOU.

Held (allowing claim and ordering defendant to pay plaintiffs RM450,000 as damages *in lieu* of specific performance with interest and costs):

(1) The MOU was a valid, binding and enforceable contract which imposed an obligation on the defendant to enter into a formal sale and purchase agreement to transfer the land to the plaintiffs. (para 7)

(2) There was certainty as to the essential terms and the mutual risks and obligations of the respective parties were set out in the MOU. It embodied a contract made on valuable consideration, the terms of which imposed an obligation on the defendant to transfer the land to the plaintiffs once it was registered in his name. The defendant's attempted 'cancelling' or 'repudiation' of the contract in the MOU was unilateral, wrongful, and in any event was never accepted by the plaintiffs. (paras 29, 30 & 41)

(3) The court found that the first plaintiff's version that the contract evidenced by the MOU was distinct and separate from the money lending transaction between his company and the defendant was more probable than improbable when tested against contemporaneous documents. As the defendant had already deposited with the first plaintiff's company a post-dated cheque as collateral for the loan, there was no necessity to issue a further cheque for RM70,000 and that too, in the name of the first plaintiff and not in his company's name. (paras 26, 28 & 40)

(4) The array of defences advanced by the defendant *ie*, lack of capacity to enter into MOU for sale of land, that the MOU was merely collateral for money lending transaction, that the MOU was only an agreement to negotiate further, that the defendant was under duress when executing MOU were

wholly without merit and unproved on the evidence. The purported 'cancellation' of the MOU by the defendant only after he had transferred the land to a third party and had received the full sale price for it, showed the defendant was conniving and scheming to wrongfully avoid his contractual obligations to the plaintiffs under the MOU. (para 42)

(5) As the land had been sold to a third party for RM1.2 million, the plaintiffs (if the land had been transferred to them) were denied of the immediate appreciation in value of the land amounting to RM500,000. However, to have benefited from that increased value the plaintiffs would have had to become the owners of the land first and that would have involved outgoings like legal, stamping and registration fees for a formal SPA and Memorandum of Transfer. Taking judicial notice of such expenses a deduction of RM50,000 from the RM500,000 was reasonable and appropriate leaving the balance as compensation recoverable by the plaintiffs from the defendant as damages *in lieu* of an order for specific performance. (paras 49, 52, 53 & 54)

Case(s) referred to:

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(dist)***
Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob [2000] 4 CLJ 324 CA ***(refd)***
Lee Hoy & Anor v. Chen Chi [1970] 1 LNS 57 FC ***(refd)***
Lim Chia Min v. Chean Sang Ngeow & Anor [1997] 2 CLJ 337 FC ***(refd)***
Lim Hong Liang & Anor v. Tan Kim Lan & Anor [1997] 4 CLJ 175 HC ***(refd)***
Ong Seok Heng v. Wee Cheong Motor & Housing Developer Sdn Bhd [1990] 2 CLJ 1007; [1990] 2 CLJ (Rep) 569 HC ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74
Specific Relief Act 1950, ss. 18(1), (2), (3), (4), (5)

For the plaintiffs - S Anthony Xavier; M/s Ram Pillai & Assocs
For the defendant - V Parthipan; M/s Parthipan & Khor

Reported by Ashok Kumar

A

JUDGMENT

Varghese George J:

Introduction – Background

B **[1]** In this suit the plaintiff had sought an order for specific performance by the defendant of a 'contract' stated to be evidenced in a memorandum of understanding dated 6 December 2009 entered into by the parties (MOU). Alternatively, *in lieu* of specific performance, the plaintiff prayed for damages together with
C interest and costs to be awarded to the plaintiff.

[2] The subject of the MOU was a piece of land held under Geran Mukim No. 191 for Lot 100, Mukim 12, Seberang Perai Tengah, Pulau Pinang (the said land).

D

On 6 December 2009 when the MOU was entered into by the parties, the defendant was not as yet registered as the owner of the said land.

[3] The defendant had however been declared to be the
E absolute owner of the said land by an order of court of 8 January 1996 obtained by the defendant in Penang High Court.

The defendant had thereafter *vide* Penang High Court Originating Motion No: 25-56-2009 sought orders to compel the relevant land
F authorities to give effect to the aforesaid order of court of 8 January 1996. The MOU was signed when this latter proceedings was still pending in court.

[4] It was the plaintiffs' claim that pursuant to the terms of the
G MOU, the plaintiffs were the purchaser of the said land from the defendant for the agreed consideration of RM700,000. It was alleged that the defendant was to enter into a formal sale and purchase agreement with the plaintiff once the defendant had completed the court proceedings in Originating Motion No: 25-56-
H 2009 and had successfully secured himself as the registered proprietor of the said land.

[5] The thrust of the plaintiff's case was that there was a valid, binding and enforceable contract between the parties by the terms of the MOU to enter into a formal sale and purchase agreement
I upon the happening of the agreed contingent event stated therein.

The plaintiff alleged that the defendant was in breach of this contractual obligation when defendant failed to enter into a formal sale and purchase agreement with the plaintiff after the defendant had secured himself registered as the proprietor of the said land but had instead proceeded to dispose the said land to a third party for a higher consideration of RM1.2 million.

[6] The defendant's defence principally was that the MOU was merely intended to be a 'collateral' for a loan of RM70,000 taken by the defendant and further that the MOU was in any event an illegal void and 'sham' agreement. It was contended that no contractual obligation to transfer the said land to the plaintiff arose under the terms of the MOU.

It was also argued for the defendant that the defendant lacked the 'capacity' to enter into the alleged 'contract' to sell the said land to the plaintiffs as the defendant was not the registered owner of the said land at the time the MOU was executed. The MOU, it was further claimed, was merely an agreement to 'negotiate' and in any event the defendant was under duress or was unduly influenced to execute the MOU.

The defendant also denied that the plaintiffs' had suffered 'damages' as claimed.

[7] After a full trial and assessment of the evidence placed before me, I held that the MOU was a valid, binding and enforceable contract which imposed an obligation on the defendant to enter into a formal sale and purchase agreement to transfer the said land to the plaintiff.

As the said land had by the date of my decision been transferred out by the defendant and was presently registered in the name of a third party, I ordered that the plaintiff was entitled to recover damages from the defendant, *in lieu* of an order for specific performance, together with interest and costs.

[8] The defendant has now appealed against my decision and I now set out the complete grounds for my decision.

Parties

[9] The first plaintiff was the father of the second plaintiff.

The first plaintiff was a director and shareholder of an incorporated company in the name of Palaniappa Chettiar Grinding Mill (M) Sdn Bhd (the company).

The company was also involved in the business of money lending and was a holder of a valid moneylender's license under the Money Lender's Act 1951.

[10] The defendant was a businessman involved in commercial and civic activities. He was also the owner of a business entity known as Nagoya Enterprise. He admitted he was familiar with commercial endeavours and transactions involving land and leases of land. He (DW1) did not appear to me that he was a person who could be easily led into transactions which had been reduced into writing or appropriately documented, or was native as to the consequences or legal implications arising from such formalised contractual relationships entered into.

MOU

[11] The MOU (see: pp. 31-33 CABD – Bahagian B) (which described the defendant as the 'first party' and the plaintiff as the 'second party') in its material parts were on the following terms:

WHEREAS

A The first party had purchased all that piece of land and hereditaments known as LOT 100, Mukim 12, Seberang Perai Tengah, Pulau Pinang held under Geran Mukim No. 19 measuring 5.106 acres (hereinafter referred to as the 'said land')

B Prior to the registration of the said land onto the name of the first party, the land was fraudulently transferred onto the name of one Syarikat Ong Seng Kee Sdn Bhd (currently the registered as owner of 1/2 share of the said land) without the knowledge and/or consent of the first party.

C The first party had obtained a declaration *vide* Court Order dated 8 January 1996 to vest the said land onto the name of the first party.

D The first party has now commenced an action in the High Court of Malaya in Penang *vide* Originating Motion No: 25-56-09, among others seeking an order to compel the Land Administrator to give effect to the said declaratory order dated 8 January 1996, which matter is still pending in court.

E *The second party is desirous of purchasing the land in the event the first party succeeds in having the said land registered onto his name and the first party is desirous of selling the said land to the second party upon the successful registration of the said land onto his name upon terms and conditions hereinafter appearing.*

And whereas it is now witnessed as follows:

1. The parties hereto mutually agree that the purchase price shall be RINGGIT MALAYSIA SEVEN HUNDRED THOUSAND (RM700,000) ONLY.

2. The second party upon execution of the memorandum of understanding the second party pays to the first party the sum of RINGGIT MALAYSIA SEVENTY THOUSAND (RM70,000) only (hereinafter referred to as the 'said deposit') as consideration and refundable deposit (the receipt whereof the first party hereby acknowledges).

3. *The parties shall enter into a formal sale and purchase agreement within one month of the successful registration of the said land onto the name of the first party or upon obtaining the final: Order from the court)whichever is earlier).*

4. *The first party shall accordingly kept the second party informed of the outcome of the court case in writing.*

5. The second party shall be at liberty to terminate this understanding at any time prior to the execution of the formal sale and purchase agreement and upon same the first party shall be liable to refund the said deposit free of interest within one month of the receipt of written notice by the second party of such termination.

6. *Upon the execution of the formal sale and purchase agreement, the said deposit shall be converted as the deposit and treated as stipulated in the said agreement.*

7. *In the event the second party fails to execute* the formal sale and purchase agreement within two month of the receipt of the written notice to do so, *the first party shall be at liberty to forfeit the said deposit* and treat this memorandum of understanding as terminated. (emphasis added)

[12] It was never in question that the defendant had executed the MOU.

It was not in dispute also that the MOU was drawn up by the defendant's own solicitors, one Mr S Sureinder. This same solicitor was also admittedly the one who represented the defendant in the Penang High Court, Originating Motion (Usul Pemula) No: 25-56-2009 (see pp. 9, 10 of CABD – Bahagian A).

[13] Recitals A to E, left me in no doubt, that the parties were well aware of what they were contracting for with each other. The said land was specifically identified and the plaintiff was acknowledged as the potential purchaser of the said land from the defendant, subject only to the defendant being registered as the owner of the said land.

It would be further noted from cls. 1 to 7 of the MOU that:

(a) The parties had reached an agreement as to the purchase price for the said land, that is the sum of RM700,000.

(b) The plaintiff (the second party in the MOU) upon execution of the MOU paid a sum of RM70,000 as 'consideration and refundable deposit' and which was acknowledged as received by the defendant.

(c) The parties were to enter into 'a formal sale and purchase agreement' within one month of the defendant being successfully registered as owner of the land or upon obtaining the final order from court, whichever was earlier.

(d) The defendant was obliged to keep the plaintiff informed of the outcome of the court case in writing.

(e) The plaintiff could at any time prior to the execution of the formal sale and purchase agreement, terminate the MOU by giving written notice thereto, and in such event the deposit (without interest) would be refundable within one month.

However, there was, no provision in the MOU, it must be highlighted, which gave the defendant any right to terminate the MOU.

(f) Upon execution of the formal sale and purchase agreement the sum of RM70,000 paid to and received by the defendant was to be 'converted' as deposit and treated as such in the envisaged formal sale and purchase agreement.

(g) On the other hand, if the plaintiffs on their part failed to execute the formal sale and purchase agreement within two month of the notice to do so, the plaintiffs ran risk of the deposit sum of RM70,000 paid by the plaintiff being forfeited and the MOU being deemed terminated.

[14] As per the terms of the MOU, the contingent event upon which the formal sale and purchase agreement was to be entered into by the defendant and the plaintiffs was expressly spelt out, namely, either:

(i) upon the registration of the said land onto the name of the defendant; or

(ii) upon the obtaining of the final order from the court, whichever was to happen the earlier. It remained always the defendant's obligation under the terms of the MOU to keep the plaintiffs informed in writing of the outcome of the court case.

First Issue

Was The MOU A Concluded And Binding Contract To Enter Into A Formal Sale And Purchase Agreement Or Was It A Façade Or Collateral For A Money Lending Transaction?

[15] The first plaintiff testified that it was Mr Sureinder (the defendant's solicitor) who first approached him with an enquiry whether the first plaintiff was interested to purchase the said land. The defendant was then introduced by Mr Sureinder to the first plaintiff and after a meeting between three of them at first plaintiff's office in Taiping and after a site visit by the first plaintiff, the MOU was entered into with the defendant.

The consideration stated in the MOU (also referred to as the said deposit) was paid to the defendant *vide* two cheques, namely:

(i) CIMB Cheque No. 684310 for RM50,000 and

(ii) CIMB Cheque No. 864311 for RM20,000

and these were acknowledge by the defendant. (pp. 7 and 8 - CABD – Bahagian A).

[16] According to the first plaintiff, at the further request of the defendant, two further payments to account of the purchase price was also made to the defendant namely, *vide*:

(i) CIMB Cheque No. 684320 (22 December 2009) for a sum of RM50,000; and

(ii) CIMB Cheque No. 684338 (19 January 2010) for a sum of RM35,000.

(See pp. 33, 34 - CABD – Bahagian B).

These further payments were supported by two separate vouchers signed by the defendant on corresponding dates and which were admitted by the court as P1 and P2 during the course of trial.

[17] The defendant had initially in court disputed signing the said vouchers (P1, P2) but under cross-examination (on 5 July 2012) the defendant finally admitted that the signatures thereto found on the vouchers were indeed his.

The vouchers P1 and P2, it need to be pointed out specifically too, made reference to the MOU of the 6 December 2009 and in P2 it was recorded therein that the cumulative amount paid to the defendant to account of the MOU (as of 19 January 2010) was RM155,000.

[18] It was also the first plaintiffs' testimony that at around the same period of time, the defendant had sought from and the first plaintiff had extended one loan as a separate money lending transaction carried out under the business of the first defendant's company. This 'money lending' transaction, it was stated further by the first plaintiff, had now been duly settled and discharged by the defendant. The first plaintiff maintained that this was the only money lending transaction or contract between the parties and it was distinct and separate transaction from the contract in respect of the said land pursuant to the terms of the MOU.

[19] In support of this contention, the first plaintiff produced during the trial the original copy of a money lending agreement dated 4 December 2009 (in Form J of the Moneylenders Act 1951) executed by the defendant for a loan of RM70,000. This agreement was admitted and marked as P4. The voucher related to this loan transaction was also introduced and admitted and marked P5.

Here too, the defendant initially disputed the signature on the voucher (P5) as his but relented under cross-examination and conceded that the signature was his.

[20] The loan sum here according to the first plaintiff was extended to the defendant in cash and the defendant had at that time, as 'collateral' for the money lent under this money lending transaction, drawn-out and handed to the first plaintiff a post-dated cheque of the defendant bearing the date 4 October 2010. The said defendant's post-dated cheque (see CIMB No. 089741 at pp. 54, 55 of CABD – Bahagian B) in favour of the first plaintiff's company, was subsequently banked in and cleared on 1 November 2010.

[21] The first plaintiff also clarified that the further payments made by the defendant to the first plaintiff's company, namely:

(i) On 5 January 2010 for RM1400 (see p. 48 CABD – Bahagian B);

(ii) On 19 January 2010 for RM875 (see p. 49 CABD – Bahagian B);

(iii) On 5 July 2010 for RM1400 (see p. 51 – CABD Bahagian B); and

(iv) On 10 February 2010 for RM875 (see p. 52 – CABD – Bahagian B).

were payments to account of interest due in respect of the money lending transaction under P4.

[22] The defendant on the other hand, maintained that the MOU was not a separate transaction with the plaintiffs but was only a 'collateral or 'comfort' for the money lending transaction between the first plaintiff' company and the defendant.

[23] The correct approach to be taken by a trial court in the context of conflicting or divergent evidence before the court has been instructively stated for the Court of Appeal by Siti Norma Yaakob JCA (as Her Ladyship then was) in the following observation made in the case *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob* [2000] 4 CLJ 324; [2000] 4 AMR 4062:

> In cases where conflicting evidence are presented before a court, it is the *duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous*

A *documents* that may tend to establish the truth or otherwise of a given fact. *In this instance,* the learned trial judge discredited the evidence of the appellant, accepted the evidence of the respondents wholeheartedly and *disregarded the contemporaneous documents totally.* We say that he had erred as he had failed to direct his mind as to the probative effect of the contemporaneous documents. *He should, after accepting the respondents' evidence, weigh it against the contemporaneous documents and evaluate whether such documents support the respondents' oral testimony.* We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents were issued. (emphasis added)

[24] In this respects, there was the contents of one other piece of contemporaneous document that, to me, could not be overlooked. In my assessment this document had a significant bearing as to whether the plaintiffs' version or the defendant's version was to be believed by the court, that is, which of the two was probable than improbable.

On 29 October 2010, the defendant had caused to be issued through his (subsequent) solicitors, one M/s Syarikat Retnam a letter 'cancelling' the MOU and forwarding a cheque (CIMB No. 119311) for the sum of RM70,000 (see p. 29 CABD – Bahagian A).

The essential parts of the said defendant's solicitors letter of 29 October 2010 are reproduced here:

> Re: Memorandum of Understanding of 6 December 2009
>
> We act for Gopal Krishnan D N Samy with instructions to write to you as follows:
>
> On 6 December 2009 you entered into a memorandum of understanding with our client.
>
> We are instructed to forward herewith a cheque CIMB Bank No. 119311 for a sum of RM70,000 as repayment of the sum given to our client under the above memorandum. **The said memorandum is cancelled forthwith.** (emphasis added)

[25] Firstly, it need to be noted that there was no issue or question raised by the defendant in this letter as to the integrity of the MOU. Nor was any assertion made for the defendant that the MOU was a 'sham' transaction or a 'collateral' to a money lending' transaction, as now made out to be by the defendant when sued as the MOU.

That solicitor's letter was admittedly written on the instructions of the defendant and it was obvious, from the plain and natural meaning of the words used therein that the binding effect of the MOU on the defendant was not being challenged but the defendant was only seeking now to 'cancel' it.

[26] Secondly, the defendant forwarded a cheque, CIMB No. 119311 for a sum of RM70,000 together with this letter. The question that arose was – whether there was a need to send an additional cheque, when as shown earlier, there was already deposited by the defendant with the first plaintiff's company a post-dated cheque as 'collateral' for the loan. If as claimed by the defendant this cheque (CIMB No. 119311) was only intended to be in settlement of the sum under the 'money lending' transaction, then the post-dated cheque would have sufficed and there was no necessity to issue a further cheque.

The defendant need only have instructed the first plaintiff to utilise the post-dated cheque. (CIMB Cheque No. 089741 at pp. 54, 55 – CABD – Bahagian B) (*supra* @ para. 20 of this grounds).

Alternatively, the defendant could have demanded the return of the post-dated cheque or even countermanded the post-dated cheque before issuing the fresh cheque. None of these, which would have been the actions ordinarily and naturally taken, occurred in this case here.

[27] The defendant's explanation was that the fresh cheque was sent on the 'advice of his solicitors'. I found this a non-chalant excuse which defied logic or belief.

In any event, the solicitor concerned here, one Mr N Nakaretnam was not called as a witness to substantiate this claim of the defendant or to justify this purported peculiar advice. (Cheque, CIMB No: 119311 was not banked in by the first plaintiff and more about this later in this grounds.)

[28] On an evaluation of the testimonies of the first plaintiff and the defendant before the court, I therefore found the first plaintiff's version that the contract evidenced by the MOU was distinct and separate from the money lending transaction between the first plaintiff's company and the defendant, more probable than improbable when tested against contemporaneous documents, made available to and before the court.

[29] Following from that, I found that the MOU was a valid and binding contract to enter into a formal contract for the sale and purchase of the said land, wherein the defendant was to be the vendor and the plaintiffs, the purchasers.

That intention of the parties were patently obvious and had been formally reduced into writing. The land involved was specifically identified and there was also *consensus ad idem* as to agreed purchase consideration, the conversion of the consideration paid upon the execution of the MOU into the 10% deposit upon execution of the formal sale and purchase agreement. Most significantly, the stipulated and agreed 'contingent event' upon which the formal sale and purchase agreement was to be drawn up and entered into by the parties was consistent to the existing factual matrix surrounding the said land at the time the MOU was signed.

There was certainty as to the essential terms, the mutual risks and intended obligation of the respective parties set out in the MOU.

[30] The MOU, in my assessment therefore, embodied a contract made on valuable consideration, the terms of which imposed an obligation on the defendant to transfer the said land to the plaintiffs once the land was registered in the defendant's name at the conclusion of the identified court proceedings. This was a bargain reached between the parties and there was no ambiguity and the anticipated events to follow.

The Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 AMR 3533 reaffirmed the oft-repeated and hallowed principle that the law leans in favour of upholding bargains and not in striking them down willy-nilly. *Charles Grenier* was a case where it was contended that there was an 'agreement to make an agreement' and this was to be deduced from the contents of relevant correspondence passing between the parties involved. Gopal Sri Ram JCA (as His Lordship then was) speaking however for the Federal Court there stated:

> We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.

They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will, acting out of necessity (see, *Liverpool City Counsel v. Irwin* [1977] AC 239), imply terms into the contract for sale in order to make it work. See, *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land a covenant on the part of the vendor to do all things necessary to give effect to the agreement.

Dr. Geoffrey Cheshire in the tenth edition of his work, *'The Modern Law of Real Property'* describes an open contract as follows:

> if a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.

Here in our instant case, the contract between the plaintiffs and the defendant in respect of the sale and purchase of the said land was, in contrast, more firmly embodied in a document with all the attendant solemnity and formality. Here was a case where the intention of the parties was not merely to be extracted or drawn from the contents of 'correspondence', as was the situation in the *Charles Grenier* case, where, based even on letters passing between parties a 'contract to enter a contract' was upheld by the court to have arisen.

[31] In my assessment, in cases where the issue before the court was whether to uphold 'a contract to contract' or not, it was essentially a question of construction whether the execution of a further contract was:

(a) a condition or term of the bargain; or

(b) whether the further contract is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

In the former case there was no 'contract' until or unless the condition or term is fulfilled but in the latter situation there was already a binding contract.

This distinction that ought to be made by the court was approved by the Federal Court in the case of *Lim Chia Min v. Chean Sang Ngeow & Anor* [1997] 2 CLJ 337, where Mohamed Dzaiddin FCJ (as His Lordship then was) approved and adopted the *dictum* of Parker J in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284 at p. 288 which was as follows:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, *it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.* In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal documents may be ignored. (emphasis added)

[32] It was my conclusion that in this case, the envisaged 'formal sale and purchase agreement' that the parties were to enter into (once the said land was registered in the defendant's name) under the terms of the MOU, fell clearly within the latter category, namely, where the expressed intention of the parties was as to the manner in which the transaction that had already been agreed to would go through and be completed.

The label used or attached to the document itself (here memorandum of understanding) was not the critical criteria either in construing whether such document had any legal effect or not. The document's true nature and purport had to be determined in any event by the court from within the language of the document and with reference to other admissible evidence. (See *Lim Hong Liang & Anor v. Tan Kim Lan & Anor* [1997] 4 CLJ 175; [1997] 5 MLJ 157).

Second Issue

Was There A Breach By The Defendant Of The MOU

[33] It was not in dispute that:

(a) On 4 March 2010, the High Court in proceedings of Originating Motion No: 25-56-2009 had proceeded to grant to the defendant the order addressed to the relevant land authorities to have the defendant registered as the owner of the whole of the said land. (See: pp. 9 and 10 CABD – Bahagian A).

(b) On 13 April 2010, the defendant was duly registered as the proprietor of the said land in the register of titles at the land office.

(c) On 19 May 2010, the defendant entered into a sale and purchase agreement with a third party (Tan Gee Chai, Koay Ah Bah & Chew Kok Peng) for the sale of the said land for a consideration of RM1.2 million. (See pp. 15 – 25 CABD – Bahagian A).

(d) On 2 September 2010, the defendant executed the memorandum of transfer (Borang 14A) in favour of the said third parties in respect of the said land. (See pp. 26 – 28 CABD – Bahagian A).

Further, the defendant admitted that he had received the full purchase price of RM1.2 million in respect of this disposal of the said land and the transfer of the said land to the third party had been effectively completed.

[34] The defendant agreed under cross-examination that it was only after he had received the full purchase consideration from the third party-purchaser that he had instructed his solicitors, M/s Syarikat N Retnam to send the said solicitors letter of 29 October 2010 to the plaintiffs (referred to earlier in this grounds), purportedly 'cancelling' the MOU.

[35] The defendant further conceded that he had not at any time informed the plaintiffs in writing of the developments in or the final outcome of the proceedings in High Court Originating Motion No: 35-56-2009 as was required under the terms of the MOU. He claimed to have informed the plaintiff orally as regards the

progress of the court case and the sale to the third party but this was a 'bare' assertion with no corroborating documentary evidence to support such a claim.

Furthermore in his solicitor's letter of 29 October 2010 (after the sale transaction to the third party had gone through in its entirely), there was no disclosure made of the completed deal between the defendant and the third party or even mention of any such alleged previous intimation on the matter given to the plaintiffs.

[36] Firstly, the defendant had failed to comply with his obligations under cl. 4 of the MOU to keep the plaintiffs informed of development or outcome of the court proceedings.

Secondly, the defendant, in stealth and surreptitiously as was clearly evident from his conduct, had entered into a sale and purchase agreement and disposed the said land to a third party for a purchase consideration which was RM500,000 higher than the agreed price under the MOU with the plaintiffs. This was in breach of cl. 3 of the MOU.

[37] Following this attempt by the defendant to 'cancel' the MOU, the plaintiffs caused to be issued three notices of demand through their solicitors to the defendant, namely:

(a) through M/s Param & Co, dated 29 December 2010 (p. 39 – CABD – Bahagian B);

(b) through M/s Ram Pillai & Associates dated 13 May 2011 (p. 42 – CABD – Bahagian B); and

(c) through M/s Ram Pillai & Associates dated 2 August 2011 (p. 46 – CABD – Bahagian B).

The first plaintiff in his testimony before the court agreed that there was some errors in so far as certain payments and calculations of sums referred to or stated in letters (a) and (b) above but he maintained that the letter (c) reflected the correct position in the matter (as was also stated in (c) itself).

[38] Nonetheless, in all three solicitors letters sent on behalf of the plaintiff, it need to be highlighted that there was this common thread which made reference to the MOU entered on 6 December 2009 and asserted that there was to be a sale to and purchase

by the plaintiffs of the said land at the agreed purchase price of RM700,000 and of the payment made of the 'deposit sum' towards the agreed purchase price.

The solicitors' letters of 13 May 2011, 2 August 2011 above, also raised the issue of the defendant having failed to keep the plaintiffs informed in writing of the said land being registered in the name of the defendant.

[39] The point that bears to be stressed here is that, notwithstanding the said written demands and assertion by solicitors for the plaintiffs, the defendant chose to ignore and remain totally silent without offering any challenge or rebuttal to those allegations of the plaintiffs, until such time as this action was filed by the plaintiffs.

If the matters were not as alleged or asserted by the plaintiffs through the solicitors' formal letters, one would have expected the defendant, a prudent businessman with much exposure in commercial transactions and affairs at that, to have seized the first opportunity to put the records straight and respond to those claims. This was not done by the defendant and the reasonable inference to be drawn was that the defendant did not have any factual basis to counter or dislodge such claims of the plaintiffs.

[40] It must be pointed out further here that the cheque (CIMB No. 119311) sent by M/s N Retnam together with their letter of 29 October 2010 purportedly 'cancelling' the MOU, was never banked in at all by the plaintiffs. The original of this unbanked cheque was produced and tendered in court by the first plaintiff and marked P3 (see also p. 30 – CABD – Bahagian A). (To be also noted was that this cheque from the defendant was made out in the name of the first plaintiff and not in the company's name if it was indeed settlement of monies under the 'moneylending transaction' as claimed by the defendant.)

The plaintiffs therefore, in my conclusion, did not as a matter of fact accept the attempted 'cancellation' of the MOU by the defendant, although the defendant wanted the court to believe otherwise.

[41] There was most definitely established on good evidence that the defendant had breached his contractual obligation to the plaintiffs under the binding contract found in the MOU.

The attempted 'cancelling' or 'repudiation' by the defendant of the contract in the MOU was unilateral, wrongful, and in any event was never accepted by the plaintiffs.

The Defendant's Rebuttal/Defences

[42] For the reasons discussed and elaborated above, I found that the array of defences advanced by the defendant against the plaintiffs' claims (eg, lack of capacity to enter MOU for sale of land, MOU merely collateral for money lending transaction, MOU only an agreement to negotiate further, defendant under duress when executing MOU) to be wholly without merit and unproved on the evidence before me. The subsequent conduct of the defendant taken as a whole, belied the twists now advanced and the denials of the defendant as to the true intentions of the parties in entering into the MOU. For one, there was no necessity at all for the defendant to 'cancel' the MOU, if the MOU was not in the first place a valid or binding contract on the defendant!

The purported 'cancellation' of the MOU by the defendant only after the said land had been transferred to a third party and after the defendant had received the full proceeds there from, clearly supported the irrefutable inference and conclusion that the defendant knew fully well his contractual obligations to the plaintiffs but was conniving and scheming to wrongfully avoid the defendant's contractual obligations under the MOU to the detriment of the plaintiffs rights and interest.

[43] It was suggested to the first plaintiff that if the MOU was indeed a binding contract for the sale and purchase of the said land, then the plaintiffs ought to have lodged a 'caveat' on the land immediately after its execution to protect the plaintiffs' interest, which was not done here by the plaintiffs. The first plaintiff's explanation was that no such caveat was entered on the specific request of the defendant as the defendant had stated that any (further) caveat lodged in respect of the said land was bound to complicate the then pending court proceedings (Originating Motion 25-56-2009) and the consequential process to have defendant registered as the owner of the said land.

I found no grounds to reject first plaintiff's testimony that there was such a request from the defendant, particularly since such a reason given by the defendant was indeed plausible in the circumstances of and defendant's own evidence in this case.

It was the testimony of the defendant himself in court that a sum of about RM140,000 or thereabouts was required by him to enable his solicitors, M/s Sureinder to clear or settle with already existing 'caveators' of the said land, before the order of court was obtained (although earlier, the defendant had testified that the same amount of money was in fact required supposedly to settle 'solicitor's fees'). The plaintiffs could not therefore, in my finding, be defaulted on that account either.

Third Issue

Damages In Lieu Of Specific Performance/Quantification Of Damages

[44] As the first plank of relief to be granted by the court in this action, the plaintiffs had sought for an order for specific performance against the defendant in the terms of the MOU.

Following from the breach of the terms of the MOU by the defendant as determined above, the plaintiffs were entitled to enter such order for specific performance against the defendant but for the fact that in the factual context now obtaining, supervening events as adverted to above had, namely caused by the breach and conduct of the defendant himself, put the said land out of the hands of the defendant and beyond the defendants control. The said land was effectively now registered in the name of third party-purchasers who had secured title to the property, by all appearances, for valuable consideration and in good faith without any notice of adverse claim by the plaintiffs.

[45] The Specific Relief Act 1950 (SRA), in particular s. 18 of the SRA has provided the court with powers to order 'compensation' *in lieu* of an order for specific performance in appropriate situations.

The pertinent provisions of that section for our consideration are reproduced below:

> Section 18(1)
>
> Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

A Section 18(2)

If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

B

Illustration

A contracts to sell a hundred gantangs of rice to B.B brings a suit to compel A to perform the contract or to pay compensation. The court is of opinion that A has made a valid contract and has broken itu, without excuse, to the injury of B, but the specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

C

D Section 18(3) ...

Section 18(4)

Compensation awarded under this section may be assessed in such a manner as the court may direct.

E Section 18(5)

The circumstance that the contract has become in capable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

F Illustrations ...

[46] In the particular circumstances now surrounding the said land, I hold that the plaintiff is entitled to an order for compensation to be recovered from the defendant for the breach by the defendant of the terms of the MOU, as an order for specific performance was no longer appropriate or enforceable against the defendant. Compensation *in lieu* of specific performance had also been specifically prayed for (see: *Lee Hoy & Anor v. Chen Chi* [1970] 1 LNS 57; [1971] 1 MLJ 76).

G

H **[47]** Under s. 18(4) of the SRA, it was for the court to direct as how the assessment of the compensation was to be undertaken. The measure of compensation or damages to be awarded *in lieu* of specific performance was to be on the same basis of assessment of damages under s. 74 of the Contracts Act 1950. (See: *Ong Seok Heng v. Wee Cheong Motor & Housing Developer Sdn Bhd* [1990] 2 CLJ 1007; [1990] 2 CLJ (Rep) 569).

I

In this case however I was of the view that there need not be a separate direction as to assessment of damages (normally by the Registrar of the court) as both the fact of the damage or loss as well as evidence as to the amount of 'loss' (for which compensation was to be ordered) was available before the court and was readily deducible by me (see: *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635).

[48] There was no known objection in principle or policy why this court if armed with all relevant material could not proceed with the assessment of compensation/damages; no worthwhile purpose would be served to order the assessment to be separately made.

In this case, it was never in dispute that within one year of the date of the MOU and also within six months of the defendant being registered as the proprietor of the said land, the defendant was able to (fact of saleability) and had proceeded to sell the said land to a third-party for RM1.2 million. The defendant had thereby derived for himself a windfall or gain of RM500,000, that is more than if he had complied with the terms of the MOU and transferred the property to the plaintiffs.

[49] The fact that the said land was sold for RM1.2 million (contracted for in May 2010 and completed before end of 2010) meant that the said land by the end of 2010 commanded a value in the market at RM1.2 million. (There was no evidence that the transaction between the defendant and the third-party purchaser was not a transaction made at arm length between a willing seller and willing buyer).

What this further meant was that if the MOU was not breached by the defendant and the said land was transferred as per the terms of the MOU to the plaintiffs, the plaintiffs would have had the benefit of the said land worth RM1.2 million. The plaintiffs had been deprived of this benefit in terms of real value.

[50] Counsel for the plaintiffs argued that the defendant should be ordered to 'compensate' the plaintiffs the whole of the sum profited by the defendant by his wrongful act in breach of the MOU, namely the sum of RM500,000. Counsel for the defendant did not put forward any specific approach to be adopted by the court in the quantification exercise, save to say actual loss must be proved.

It is also noteworthy here that the plaintiffs' means or financial ability to complete the sale and purchase of the said land as per the MOU was not challenged at the trial at all. There was therefore no issue that the plaintiffs would not have been able to complete the purchase contracted for in the MOU.

[51] In my view there could be two approaches taken in quantifying the compensation recoverable from the defendant in the particular circumstances of this case. The first, the equivalent quantum of the 'profit' derived by the defendant from his own wrongful act in breaching the MOU based on the time-honoured principle of equity that no one should benefit from his own wrong.

The alternative approach would be to determine the 'loss' occasioned to the plaintiffs with reference to the value of the land, that is if the terms of the MOU had been duly observed by the defendant. In other words what was the 'value of land' in terms of money that the plaintiffs had been deprived of or denied by the defendant's breach of the MOU.

[52] The second approach was preferred by me in this case. This was also consistent with counsel for defendant's contention that it should reflect 'actual loss' caused to the plaintiffs.

It was established on evidence that the said land fetched a value of RM1.2 million when it was sold to the third-party by the defendant before the end of 2010. If the plaintiffs had to complete the MOU, the plaintiffs would have had to fork out RM700,000 no doubt, to derive that value. In other words the plaintiffs had been denied the immediate appreciation of value on the said land amounting to RM500,000. This was not a matter of speculation but borne out on the facts.

[53] It should however be borne in mind, that to benefit from an increased value in the said sum of RM500,000, the plaintiffs had to have the said land first registered in their names before it could be disposed to derive that benefit. This would involve outgoings, like attendant legal, stamping and registration costs related to the preparation of the formal sale and purchase agreement, the memorandum of transfer (from defendant to plaintiffs), which all in ordinary course are normally borne by the purchaser (the plaintiffs) in a sale and purchase transaction.

The court was entitled to take judicial notice of such expenses that the plaintiffs would in any event be liable for if the envisaged sale and purchase under the MOU was to be indeed completed. I was therefore of the view that there should be an adjustment downwards or factoring of such expenses into the 'loss in value' in any event and accordingly I considered a deduction of RM50,000 from the RM500,000 to be reasonable and appropriate in the matter.

[54] It was my finding therefore that the compensation recoverable by the plaintiffs from the defendant *in lieu* of an order of specific performance in this case was RM450,000.

Accordingly I ordered that there be judgment entered as follows:

(a) The defendant had breached the contractual terms in the MOU and the defendant was to pay the plaintiffs the sum of RM450,000 as compensation *in lieu* of an order for specific performance of the MOU;

(b) The defendant was to pay interest on the said sum of RM450,000 at the rate of 4% pa. from date of judgement until full settlement; and

(c) The defendant was to pay plaintiff cost of this action assessed and fixed at RM35,000.